AND
BRIEFS

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In The
# Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL.,

*Petitioners,*

v.

JESUS MESA, JR., ET AL.,

*Respondents.*

**On A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are twelve scholars of constitutional law. Some have written extensively on issues relating to the extraterritorial application of rights, and others have developed expertise more generally on the Constitution and the rights it protects. The *Amici* are concerned that the *en banc* decision of the court of appeals cannot be reconciled with this Court's governing precedents on the application of the Constitution outside the formal territory of the United States, and exposes children and adults in towns adjoining the U.S. border to arbitrary killing by federal agents.

The *Amici* include the following professors[2]:

**T. Alexander Aleinikoff**, Columbia Law School

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[1] *Amici* affirm that all parties have consented to the filing of this brief, and those consents are on file with the Clerk of Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Current institutional affiliations are offered for identification purposes only.

**Gillian E. Metzger**, Columbia Law School

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## SUMMARY OF ARGUMENT

*Amici* submit this brief as constitutional law scholars concerned to ensure the proper scope of application for constitutional guarantees in extraterritorial contexts. In proceedings below, the court of appeals determined that a federal court could not hear the petitioners' Fourth and Fifth Amendment claims arising from the shooting and killing of an unarmed teenager at the border between the United States and Mexico, because the teenager lacked sufficient voluntary contact with the United States. The court of appeals erred by applying that standard and its judgment should be reversed on that basis.

This Court's governing precedents reject the formalistic standard adopted by the court of appeals, and instead require evaluation of the extraterritorial application of rights using the functional approach that this Court articulated in *Boumediene v. Bush* and in Justice Kennedy's controlling concurring opinion in *United States v. Verdugo-Urquidez*. The Court's decisions applying this functional approach establish that, while courts may inquire into the relationship between a person seeking relief and the United States, "voluntary connections" are by no means the sole or paramount factor determining the extraterritorial application of constitutional rights. Indeed, *Boumediene* itself applied a constitutional guarantee extraterritorially to individuals who had no voluntary connections to the United States, but rather were non-residents who had been forcibly brought to the Guantanamo Bay prison by U.S. authorities. As this Court explained, federal courts must instead take into account a range of relevant factors that affect the practicality of applying constitutional protections to people subjected to U.S. government power outside the country's borders. These factors include the characteristics of the person whose rights are at issue, the location of relevant events, and the practical obstacles to the application of the right extraterritorially in the relevant context.

The court below failed to apply this functional test, applying instead the standard proposed by four members of the Court in *Verdugo-Urquidez*. The plurality's standard never constituted a controlling decision of this Court and, indeed, was not accepted either in

Justice Kennedy's concurring opinion in *Verdugo-Urquidez* or in the opinions of the Court's remaining members, or by this Court in *Boumediene*. The court of appeals moreover erred in relying on *Verdugo-Urquidez* as resolving the issues before it, because *Verdugo-Urquidez* concerned only searches of property in foreign countries. Searches of property are fundamentally distinguishable from the issue presented here – the taking of human life – because the right to be free from unjustified killing does not vary among nations and their citizens, even if expectations of privacy might. *Verdugo-Urquidez* thus does not govern the constitutional inquiry in this case, which concerns the taking of human life as a "seizure" or deprivation under the Fourth and Fifth Amendments.

Proper application of this Court's functional approach shows that the Fourth and Fifth Amendments guaranteed Mr. Hernandez's life against a shooting by U.S. agents across the El Paso-Juarez border. Hernandez's status as an unarmed teenage civilian, his presence near the division between an interdependent pair of border communities, the fact that Respondent Mesa shot him from within U.S. territory, the absence of any practical obstacles to applying normal rules on the use of lethal force at the relevant time, and the crucial importance of the right at stake – the right to life itself – weigh together strongly in favor of the application of constitutional guarantees. Accordingly, *Amici* constitutional law scholars respectfully urge this Court to reverse the decision of the court of appeals based on its

failure to apply the appropriate standard for determining extraterritorial application of the constitutional guarantees at issue in this case.

## ARGUMENT

### I. The Governing Standard for This Case Is the Functional Approach Set Forth in *Boumediene v. Bush* and Not the Formalistic Approach of the Lower Court That *Boumediene* Rejected

This Court's controlling precedents require that courts apply a functional approach to determine whether a constitutional violation occurs under the Fourth and Fifth Amendments when a federal officer shoots and kills an individual outside U.S. borders. Under this functional approach, the extraterritorial application of constitutional rights turns upon a number of factors. *See Boumediene v. Bush*, 553 U.S. 723, 766 (2008). It does not – as portions of the lower court's *en banc* decision and Respondent Mesa assert[3] – formalistically require the plaintiff to establish that the victim had a "significant voluntary connection" to the United States. *Id.*; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275-78 (1990) (Kennedy, J., concurring). Rather, the functional approach requires the Court to consider together several factors: the relationship of

[3] Brief of Jesus Mesa, Jr. in Opposition to Petition for a Writ of Certiorari at 10-11; *Hernandez v. United States*, 785 F.3d 117, 122 (5th Cir. 2015) (en banc) (Jones, J., concurring).

the victim to the United States, the location of the relevant acts, any practical impediments associated with enforcing the right extraterritorially, and the importance of the right at stake – which in this case involves life itself.

### A. *Boumediene* Requires a Functional Approach to the Extraterritorial Application of Constitutional Rights in This Case

In *Boumediene v. Bush*, this Court explained that the enforcement of constitutional rights rests not on the nationality of the victim or territorial boundaries, but on functional considerations. *See* 553 U.S. at 755-66. "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject to 'such restrictions as are expressed in the Constitution.'" *Id.* at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)). The scope of these constitutional restrictions is not determined by formal Nineteenth Century categories of territorial sovereignty, but by a "functional approach" that takes into account the "practical obstacles" to the enforcement of a particular restriction in a particular location. *Id.* at 764, 766. In an era when governmental power routinely transcends geographic boundaries, the functional approach seeks to reconcile respect for fundamental constitutional values with the constraints that external conditions sometimes place on strict application of constitutional guarantees.

The Court held in *Boumediene* that noncitizens captured in foreign countries and detained as "enemy combatants" at the Guantanamo Bay Naval Base in Cuba were constitutionally entitled to challenge, by writ of habeas corpus, the legality of their detention. *Id.* at 770. In doing so, the Court refused to give effect to a congressional statute that provided these noncitizens less judicial review than the Constitution required. *Id.* at 787-92.

The *Boumediene* decision, in which a unified majority joined, clarified the meaning and limits of earlier holdings about the extraterritorial application of constitutional rights, drawing upon elements of prior fragmented Court decisions. In particular, the Court adopted the analysis of the concurring Justices Harlan and Frankfurter in *Reid v. Covert*, 354 U.S. 1 (1957), and Justice Kennedy in *United States v. Verdugo-Urquidez*, which turned on whether, after review of the facts and context, affording a particular constitutional right extraterritorially would be "impracticable and anomalous." *See Boumediene*, 553 U.S. at 759-60 (quoting from Justice Harlan in *Reid v. Covert* and Justice Kennedy in *Verdugo-Urquidez*). In *Reid*, the Court found inadequate justification for denying spouses of U.S. servicemembers their Fifth and Sixth Amendment rights to grand jury indictment and jury trial in U.S. proceedings abroad for allegedly murdering their husbands at military installations overseas. *See* 354 U.S. at 40-41. The *Boumediene* Court cited with approval Justice Harlan's reliance on the "particular circumstances, the practical necessities, and the possible

alternatives which Congress had before it" in determining whether the constitutional provisions could be applied. *See* 553 U.S. at 759-61. Likewise, in *Verdugo-Urquidez*, in which the Court upheld the warrantless search by U.S. agents of the home in Mexico of an alleged druglord, Justice Kennedy's opinion rested upon the practical impact of applying extraterritorial limits on cooperative law enforcement abroad. *See* 494 U.S. at 278 (Kennedy, J., concurring). In tying together these functional considerations, the *Boumediene* decision rejected simplistic reliance on status distinctions – such as citizenship and *de jure* sovereignty – as a means of determining whether constitutional protections applied to noncitizens in foreign locations.

*Boumediene*'s reliance on functionalism is further confirmed by its discussion of the World War II-era decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which denied habeas corpus to convicted war criminals in an Allied prison in occupied Germany. *See Boumediene*, 553 U.S. at 762. The *Boumediene* Court characterized *Eisentrager* as a decision that rested on specific practical considerations relevant to its time and place – namely, the difficulties of providing a habeas corpus proceeding to enemy aliens during the post-war military occupation – and rejected the "formalistic, sovereignty-based" interpretation of *Eisentrager* advanced by the Government. *Id.* at 762-64. The Court reiterated its earlier insistence in *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004), that the denial of rights in *Eisentrager* depended on the particular situation of the

convicted war criminals in that case, "not formalism." *Boumediene*, 553 U.S. at 764.

The functional approach to the extraterritorial applicability of constitutional rights requires courts to assess the context of the government or government agent's action, including at least three types of factors: the circumstances of the person whose rights are at issue, the location of relevant events, and the practical obstacles to the application of the constitutional right. For the particular right at issue in *Boumediene*, for example, the Court focused on:

> (1) the citizenship *and* status of the detainee *and* the adequacy of the process through which that status determination was made; (2) the nature of the *sites* where apprehension *and then* detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

*Id.* at 766 (emphasis added). Thus, the Court's decision did not turn simply on whether the individuals whose rights were at issue were citizens or noncitizens, nor did it demand as a prerequisite for constitutional protection proof of any voluntary connection between the individual and the United States or its territory. Indeed, there was no dispute that the petitioners in *Boumediene* were noncitizen prisoners brought to the naval base against their will.

The *Boumediene* Court's decision emphasizes that under the functional test, the inquiry is fact-specific. Because constitutional limits are intended to restrict

government misconduct rather than merely divert it to specific locations, the Court considered more than one relevant location as contributing to the analysis. It considered the locations of the detainee's capture and his detention. *See id.* at 766-69. It also treated the "nature" of these "sites" as potentially varying in time. The Court did not simply distinguish between locations within or outside U.S. territory to determine the Constitution's application, or between foreign countries as a whole. The *Boumediene* Court's explanation of the unavailability of habeas corpus in *Eisentrager* focused with particularity on the situation of "Landsberg Prison, circa 1950." *Id.* at 768; *see also Reid*, 354 U.S. at 75 (Harlan, J., concurring in the result) (emphasizing the relevance of "the particular local setting, the practical necessities, and the possible alternatives"). The Court also indicated that the practical obstacles could vary with time as well as location, so that "if the detention facility were located in an active theater of war," the arguments against making the right available would have more weight. *Boumediene*, 553 U.S. at 770; *see also Reid*, 354 U.S. at 65 (Harlan, J., concurring in the result) (focusing on overseas court-martial "in times of peace"); *id.* at 45 (Frankfurter, J., concurring in the result) (limiting the question to "time of peace"); *id.* at 50-64 (Frankfurter, J., concurring in the judgment) (explaining that precedent upholding consular court trials in Japan must be understood in its particular historical context). Finally, the *Boumediene* Court emphasized the importance of the right at stake in assessing the extraterritorial application of rights. The Court stressed the "centrality" of habeas corpus,

characterizing it as "a right of first importance." *Boumediene*, 553 U.S. at 739, 798; *see also* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. Cal. L. Rev. 259, 273 (2009). Consideration of these factors is incompatible with a single-minded focus on voluntary connections.

The *Boumediene* decision thus makes clear that the functional approach applied by the concurring Justices Harlan and Frankfurter to the Fifth and Sixth Amendments in *Reid* and by Justice Kennedy to the Fourth Amendment in *Verdugo-Urquidez* governs the extraterritorial effect of the Fourth and Fifth Amendments. The Court's analytic approach in *Boumediene*, and the authorities it cited, were not limited to any particular setting or constitutional provision. Rather, as the Court concluded in no uncertain terms, the "common thread uniting" the Court's cases on the extraterritorial application of rights has been that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764.

### B. The Plurality Opinion in *United States v. Verdugo-Urquidez* Does Not Provide Guidance for This Case

Respondent Mesa and the Fifth Circuit's *en banc* decision place inappropriate reliance on portions of Chief Justice Rehnquist's opinion that spoke only for himself and three other members of the Court in *United States v. Verdugo-Urquidez*. *See Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en

banc) (per curiam). Not only was the Chief Justice's opinion never controlling, but also its reasoning was implicitly repudiated by the Court in *Boumediene*, which applied a functional approach and which never cited the *Verdugo-Urquidez* plurality. Chief Justice Rehnquist's opinion thus does not provide the test for measuring extraterritorial application of rights, and it does not assist in resolving the present case.

The Court held in *Verdugo-Urquidez* that the Fourth Amendment did not limit a search by U.S. agents inside Mexico of the home of a nonresident alien. 494 U.S. at 274-75 (Rehnquist, C.J.); *id.* at 275 (Kennedy, J., concurring). Chief Justice Rehnquist's opinion offered a variety of explanations for this conclusion that, if controlling, would have severely limited the rights of noncitizens subjected to U.S. authority who had not established voluntary connections to the United States.

The Chief Justice's opinion was not, however, controlling. Although the opinion was nominally the Opinion of the Court, the fifth vote came from Justice Kennedy, whose own concurrence instead applied the functional approach that Justice Harlan (and Justice Frankfurter) had applied in *Reid v. Covert*, and that a majority of this Court later approved as controlling law in *Boumediene*. *Id.* at 275-78 (Kennedy, J., concurring); *cf. Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed

as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)); *Boumediene*, 553 U.S. at 759-60 (noting that Justice Harlan's and Justice Frankfurter's "votes were necessary to the Court's disposition" in *Reid*, and applying their practical approach). Justice Kennedy's narrower concurrence emphasized the unavailability of a warrant procedure for extraterritorial searches, the varying conceptions of privacy in other cultures, and the need for cooperation with foreign officials as reasons for limiting the reach of the relevant Fourth Amendment constraints. *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring). It did not adopt the plurality's broad, bright-line rule requiring "significant voluntary connections" as a prerequisite to the Constitution's protection. Indeed, contemporaneous analysis of the opinion by courts and commentators confirms that Chief Justice Rehnquist's opinion spoke for only a plurality. *See Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991); Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 972 (1991); *see also* Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2520 (2005).

Were there any doubt that Chief Justice Rehnquist's opinion lacked controlling effect, *Boumediene* resolved it. The decision rejected one of the fundamental propositions that Chief Justice Rehnquist had proffered – namely, that the Constitution generally requires a "significant voluntary connection" to the United States as a prerequisite for a noncitizen to enjoy constitutional rights. *Cf. Hernandez*, 785 F.3d at

133 (Dennis, J., concurring in part and concurring in the judgment) ("[T]he *Verdugo-Urquidez* view cannot be squared with the Court's later holding in [*Boumediene*] that 'questions of extraterritoriality turn on objective factors, and practical concerns, not formalism.'"). That element was obviously lacking in *Boumediene*, where there is no dispute the detainees had been brought to Guantanamo against their will. Nonetheless, the Court invalidated an act of Congress without any showing of a significant voluntary connection. Indeed, Justice Scalia, then the sole remaining member of the *Verdugo-Urquidez* plurality, recognized in dissent in *Boumediene* that the Chief Justice's opinion had not been adopted, and he criticized the majority's functional approach as inconsistent with a rigid status-based rule against extraterritorial rights for noncitizens. *See, e.g.*, 553 U.S. at 841-43 (Scalia, J., dissenting) (citing *Verdugo-Urquidez*).

The *Verdugo-Urquidez* plurality's "significant voluntary connection" requirement is inconsistent with not only *Boumediene* and Justice Kennedy's controlling concurrence in *Verdugo-Urquidez*, but also with courts' frequent application of constitutional protections to noncitizens who bear little or no connection to the United States. For example, the Due Process Clauses of the Fifth and Fourteenth Amendments do not make such connections a condition for constitutional protection – to the contrary, the *absence* of "minimum contacts" between a civil defendant and the United States (and to the particular forum State) provides the very reason why a U.S. court's exercise of

jurisdiction over the defendant would *violate* the Due Process Clause. *See, e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879-81 (2011) (plurality opinion) (explaining why due process prohibits exercise of jurisdiction without minimum contacts); *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 330 (4th Cir. 2013); *Holland Am. Line, Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 459-61 (9th Cir. 2007).[4] Similarly, in criminal cases, the fact that defendants were involuntarily brought into the United States for prosecution does not affect their right to the constitutional protections governing criminal trials. *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring); *see also United States v. Robinson*, 843 F.2d 1, 4-8 (1st Cir. 1988) (Breyer, J.) (ex post facto clause); *United States v. Tinoco*, 304 F.3d 1088, 1096-1111 (11th Cir. 2002) (right to jury trial); *see also* Kal Raustiala, Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law 171-72 (2009) (explaining how making constitutional rights depend on

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[4] Courts of appeals have recognized that providing due process protections to foreign defendants would be inconsistent with the *Verdugo-Urquidez* plurality's "voluntary connections" requirement if, indeed, that requirement were the *sine qua non* of noncitizens' constitutional rights. *See, e.g.*, *GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 819 (D.C. Cir. 2012) (Williams, J., concurring); *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 n.* (D.C. Cir. 2005); *see also Aftam Exp. Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1362 (7th Cir. 1985) (making a similar point before *Verdugo-Urquidez*). Of course, no inconsistency arises if "voluntary connections" are not the *sine qua non* of noncitizens' constitutional rights, but rather one factor.

connections conflicts with established precedent and practice).

Under the functional approach to extraterritorial constitutional rights, the notion of "significant voluntary connections" might nonetheless remain a relevant consideration. For example, in *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (9th Cir. 2012), the Ninth Circuit harmonized the functional approach of *Boumediene* with the plurality opinion in *Verdugo-Urquidez* by treating "significant voluntary connections" as just one (neither necessary nor sufficient) factor to consider in determining a noncitizen's constitutional protection. *See id.* at 996-97. Similarly, the Second and Seventh Circuits considered a range of functional considerations in analyzing how the Fourth Amendment applied to searches of *citizens'* property abroad; they ultimately concluded that the reasonableness requirement applied but the Warrant Clause did not. *See, e.g., United States v. Stokes*, 726 F.3d 880, 890-93 (7th Cir. 2013); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 170-72 (2d Cir. 2008). None of these decisions focused solely on status or "voluntary connections."

Respondent Mesa and the Fifth Circuit's concurring opinion thus wrongly treat the plurality opinion in *Verdugo-Urquidez* as if it expresses the general rule while *Boumediene* merely reflects some minor exception applicable only to the right to habeas corpus and only at Guantanamo. This view ignores Justice Kennedy's key concurring opinion in *Verdugo-Urquidez*. It ignores this Court's and lower courts' frequent

application of due process protections to noncitizen defendants, and it ignores this Court's specific instruction regarding the proper reading of *Johnson v. Eisentrager*. Indeed, the Fifth Circuit's analysis is a complete inversion of the constitutional analysis articulated by this Court in *Boumediene*. For reasons well explained by this Court, many factors other than the relationship between an individual and the United States may determine the applicability of the Fourth Amendment or other constitutional rights. Status is just one factor, considered along with other practical factors in analyzing the feasibility of applying a constitutional right abroad.

### C. The Fourth Amendment Holding of *Verdugo-Urquidez* Is Also Inapplicable to the Fourth and Fifth Amendment Issues in This Case

Besides not being the controlling law, the facts and conclusion of the *Verdugo-Urquidez* plurality opinion are distinguishable from those presented here. Whatever precedential value the *Verdugo-Urquidez* decision retains after *Boumediene* is limited to the question of searches and seizures of a nonresident alien's property outside the United States. That is the issue identified by both the plurality and Justice Kennedy's concurrence as the subject of the Court's inquiry. *See Verdugo-Urquidez*, 494 U.S. at 261 (noting the question to be resolved in the plurality opinion's very first paragraph); *id.* at 278 (Kennedy, J., concurring).

*Verdugo-Urquidez*'s analysis of the extraterritorial application of claims concerning interference with privacy and property rights is, on its face, plainly distinguishable from the issues presented in this case – namely the killing of a human being. *Verdugo-Urquidez* does not pose, let alone settle, the question of when a cross-border killing amounts to an arbitrary deprivation of life in violation of the Due Process Clause of the Fifth Amendment. This Court has also never considered *Verdugo-Urquidez* in a case involving the "seizure" of a person by killing or excessive use of lethal force. *Verdugo-Urquidez*'s facts related only to search and seizure of property. By contrast, the right to life is not subject to the varying expectations of privacy across cultures described in *Verdugo-Urquidez*; it is a universally recognized imperative. Whatever may be said about differing expectations of privacy in the home among different societies, the interest in not being killed is shared everywhere.[5] This case raises substantially different concerns about the nature of the right at issue, the consequences of its violation, the practicality of other alternatives, and the other factors addressed in Justice Kennedy's concurrence.

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[5] At the global level, restrictions on the use of lethal force are articulated in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and endorsed in General Assembly Resolution, 47th Sess., 69th plen. mtg., U.N. Doc. A/RES/45/166 (Dec. 18, 1990). These Basic Principles are a staple of international human rights monitoring. *See, e.g.*, U.N. Human Rights Comm., General Comm. No. 35, Article 9 (Liberty and security of person), ¶ 9, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

Thus, even if the cross-border use of deadly force by Respondent Mesa is viewed as an extraterritorial "seizure" within the meaning of the Fourth Amendment, an entirely separate analysis under the functional approach set forth in Justice Kennedy's concurrence would still be required. In sum, *Verdugo-Urquidez*'s consideration of the Fourth Amendment's application to a search inside Mexico of a noncitizen's home fails to address the Fourth and Fifth Amendments' application to the taking of a life at issue here.

## II. The Functional Approach Requires Application of the Fourth and Fifth Amendments in This Case

The Fifth Circuit's *en banc* opinion mistakenly applied a formalistic analysis to the cross-border killing of Sergio Adrian Hernandez Guereca to assess whether he was entitled to extraterritorial application of the Fourth Amendment's protections.[6] Relying on

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[6] The Fourth and Fifth Amendments contain overlapping limits on unjustified deprivation of life. Under the Fourth Amendment, a killing that amounts to a "seizure" of the person may violate the guarantee against unreasonable searches and seizures. Under the Fifth Amendment, a killing may violate substantive due process limitations on the deprivation of life. This Court has made clear that when the Fourth Amendment applies and governs a case, courts should analyze the claim under the more specific Fourth Amendment standard rather than the more general Fifth Amendment standard, but that when the Fourth Amendment does not apply, Fifth Amendment analysis controls. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). The same functional criteria provide the relevant factors for analyzing either the Fourth or Fifth Amendment versions of this right.

*Verdugo-Urquidez*, the Fifth Circuit concluded that Hernandez's survivors could not assert a claim under the Fourth Amendment because Hernandez was "a Mexican citizen who had no 'significant voluntary connection' to the United States . . . and who was on Mexican soil at the time he was shot[.]" *Hernandez*, 785 F.3d at 119.[7]

Had the Fifth Circuit instead followed the functional approach of *Boumediene*, its analysis would necessarily have considered other factors including Hernandez's particular characteristics, the locations of relevant events, and the practical obstacles to the application of the right. As this Court demonstrated in *Boumediene*, under the functional approach, the relevant factors should include the actions and rights at stake. *See* 553 U.S. at 798 (describing the right of habeas corpus as "a right of first importance"). In particular, the lower courts in this case should have considered the following factors:

*Personal characteristics*. Hernandez was a Mexican national. He was a vulnerable civilian only 15 years old. He was not armed or threatening harm when Agent Mesa shot him in the head.

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[7] The Fifth Circuit was divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment. Ultimately, the court declined to reach the issue, relying instead on a qualified immunity analysis that has also been challenged in this case. *Hernandez*, 785 F.3d at 120; *see also id.* at 133 (Prado, J., concurring).

*Locations of relevant events*. In this case, the functional analysis takes into consideration both the location where the victim was killed and the location from which the shot was fired. Hernandez's killing took place in a cement culvert (the former course of the Rio Grande) that straddles the border between the United States and Mexico near the Paso Del Norte Port of Entry, one of four international ports of entry linking El Paso, Texas, with Ciudad Juarez, Chihuahua, Mexico. As part of a children's game, Hernandez had advanced onto the U.S. portion of the culvert in order to touch the border fence that stands on higher ground. Minutes later Hernandez was killed while standing on the Mexican portion of the culvert. Agent Mesa had been patrolling the culvert on a bicycle, and he fired his weapon from inside U.S. territory, with access to institutional support to control the Mexican side of the border region.

Contrary to the Fifth Circuit's generic characterization of the events as occurring simply "across the border" or in "foreign territory," the functional approach would take into consideration these multiple locations and the specific characteristics of the border zone that runs through this binational metropolitan area. Several million Mexicans and several million Americans live in such border communities, many of whom cross the border daily due to jobs or family on the other side. As the Fifth Circuit panel had recognized on initial review, the U.S. Border Patrol also exercises an unusually high degree of control over the area of Mexico immediately across the formal

El Paso-Juarez border, including the heavy presence and regular activities by U.S. border authorities in Mexico. *See Hernandez v. United States*, 757 F.3d 249, 270 (5th Cir. 2014) ("Border Patrol agents are not representatives of a temporary occupational force. They are influential repeat players in a 'constant' border relationship."), *adhered to in part on reh'g en banc*, 785 F.3d 117. It is also relevant that the border is shared with an ally, with whom the United States is at peace.

*Practical obstacles to the application of the right.* Practical obstacles to the application of the right in this situation are difficult to find. Whether one considers the Fourth Amendment right against unreasonable deployment of lethal force in making a seizure, or the Fifth Amendment right against arbitrary deprivation of life, there is no apparent reason why U.S. law enforcement personnel acting in U.S. territory cannot refrain from killing civilians on the southern side of the border under the same principles that protect civilians on the northern side.

The functional approach, as *Boumediene* explains it, asks whether compliance with a constitutional command would be "impracticable and anomalous" in the relevant range of circumstances. It does not demand that the command be practicable always and everywhere, including in some hypothetical future war, before it can ever be applied extraterritorially. In short, Agent Mesa did not face the logistical problems that U.S. officials actually operating in foreign territory may confront, and which could create

practical obstacles to compliance with constitutional commands.[8]

There is also no practical obstacle limiting the Court's capacity to adjudicate this case fairly. Courts have adjudicated many instances of material harm inflicted on physically absent noncitizens through government acts performed within the United States as within the scope of their constitutional rights. *See, e.g.*, *Asahi Metal*, 480 U.S. at 116; *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 488-89 (1931) (finding a Fifth Amendment taking in the 1917 requisitioning of a contract for construction of two vessels); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982); *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106 (2d Cir. 1966) (Friendly, J.).[9]

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[8] For that reason, it is not even clear that this case necessarily involves extraterritorial application of constitutional rights.

[9] In *Sardino*, Judge Henry Friendly wrote:

> The Government's second answer that 'The Constitution of the United States confers no rights on non-resident aliens' is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders – and even to some without. *Cf. Reid v. Covert*. . . . This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing that they were protected by constitutional guarantees; today, for other reasons, we are still eager to attract foreign funds.

*The importance of the right at stake*. The right at stake here – the right to life – is fundamental and universal. "The intrusiveness of a seizure by means of deadly force is unmatched. The [individual's] fundamental interest in his own life need not be elaborated upon." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). Here, the interest asserted is *the* bedrock constitutional guarantee not to be deprived of your life. These interests are heightened by the particular facts here: the killing of a defenseless teenager in his own home town.

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Taken in combination, the facts discussed above weigh overwhelmingly in favor of the applicability of Fourth Amendment and Fifth Amendment protections against unjustified killing,[10] even without inquiring into the particular history of the victim and his "connections" to the United States.[11] Given the lack of

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361 F.2d at 111 (citation and footnote omitted). The case rejected on the merits a constitutional challenge to a regulation that prevented the transfer to Cuba of the proceeds of an insurance policy.

[10] Although each version should be applicable, a court would leave the substantive due process guarantee in the background if the Fourth Amendment right already provided protection.

[11] Agent Mesa's killing of Hernandez presents slightly different facts from the otherwise similar case of *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (appeal pending), which also involved a Border Patrol agent's killing of an unarmed teenager in a border community. The adjoining towns of Nogales, Arizona and Nogales, Mexico are separated only by a border fence, not a culvert, and the victim J.A. was walking on a city street when Agent Swartz shot him fatally from the Arizona side. The district court in *Rodriguez* found that J.A. did have "substantial voluntary

practical obstacles, refusing to apply the right would mean disregarding constitutional limits on extra-judicial killings by government officials solely because of the victim's nationality and the officer's choice of where and when to shoot.

## CONCLUSION

The Fifth Circuit failed to apply a functional test that focuses on the facts of Mr. Hernandez's particular case, as required by this Court's analysis in *Boumediene* and the controlling opinion in *Verdugo-Urquidez*. The Fifth Circuit's approach, which rigidly focused on nationality and "voluntary connections," is inconsistent with these controlling precedents, which rejected the formalistic approach of the *Verdugo-Urquidez* plurality. For that reason, *Amici*

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connections" to the United States for Fourth Amendment purposes, given the interdependent character of the two towns, the proximity of his home to the border, and his close familial relations with his grandparents who lived in Nogales, Arizona. *See* 111 F. Supp. 3d at 1036.

While the *Rodriguez* case illustrates the variations in facts that the Border Patrol shootings raise, *Amici* submit that the lives of residents in these border communities should not depend on such particular personal details. Under the functional approach, the demonstration of prior voluntary connections may strengthen the claim to Fourth or Fifth Amendment rights, but it is not a *sine qua non* for constitutional protection against cross-border killing.

Constitutional Law Scholars respectfully urge this Court to reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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